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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ALBERT H. HOLMES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Under Rule 19(1)(b):

The trial court has so far departed from the accepted and usual course of judicial proceeding in sanctioning such a departure from the rules of evidence, as to call for an exercise of this court's power of supervision:

(1) Did an anonymous notation, authored by a person in no way connected with the selective service system, which was lodged in petitioner's selective service file, which asserted that he had failed to report for civilian service as directed, qualify for admission in evidence as a business record exception to the hearsay rule under the Federal Business and Official Records Act (28 U.S.C. Sections 1732, 1733)? 9

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Albert H. Holmes, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered on November 20, 1967, in the above entitled cause.

CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, printed in Appendix A hereto, *infra*, page App. 1, is unreported at the present.

JURISDICTION

The opinion and judgment of the Court of Appeals were filed and entered on November 20, 1967. A timely petition for rehearing was denied on January 2, 1968. This Petition for Writ of Certiorari will be timely filed on or before February 1, 1968.

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Did an anonymous notation, authored by a person in no way connected with the selective service system, which was lodged in petitioner's selective service file, which asserted that he had failed to report for civilian service as directed, qualify for admission in evidence as a business record exception to the hearsay rule under the Federal Business and Official Records Act (28 U.S.C. Sections 1732, 1733)?

(2) If question (1) is answered in the affirmative, does such an application of the Federal Business and Official Records Act constitute a denial of petitioner's Sixth Amendment right to confront the witness against him?

(3) Absent a declaration of war, does an order to report for civilian work under the Uniform Military Service and Training Act, constitute an order of involuntary servitude in violation of the 13th Amendment and the due process clause of the 5th Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

The 6th Amendment to the Constitution of the United States provides in material part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ."

The 13th Amendment to the Constitution of the United States provides in material part as follows:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The 5th Amendment to the Constitution of the United States provides in material part as follows:

> "No person shall be . . . deprived of life, liberty or property without due process of law; . . ."

STATUTES INVOLVED

28 U.S.C. §1732(a) provides in material part:

> "In any court of the United States . . . any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence or event, if made in the regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.
>
> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business' as used in this section, includes business, profession, occupation, and calling of every kind."

28 U.S.C. §1733(a) provides in material part as follows:

"Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept."

Rule 44 of the Federal Rules of Civil Procedure (made applicable to these proceedings by Rule 27 of the Federal Rules of Criminal Procedure) provides in material part:

"(a) Authentication.

(1) *Domestic.* An official record kept within the United States, or any state, . . . or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof, or by a copy attested by the officer having legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody . . .

"(b) Lack of Record. A written statement that after diligent search no record or entry of a specific tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this Rule . . . is admissible as evidence that the records contain no such record or entry.

"(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law."

STATEMENT OF THE CASE

The Petitioner, Albert H. Holmes, a conscientious objector, was indicted under a charge of violating the Universal Military Training and Service Act (50 U.S.C. §462), the indictment alleging that he knowingly failed to report for civilian work at the Elgin State Hospital, Elgin, Illinois, on the 21st day of February, 1966 purportedly under an order to report for civilian work contributing to the maintenance of the national health, safety and interest. By timely motion and objection, he challenged the constitutional validity of the prosecution on the basis of the 5th and 13th Amendments to the Constitution of the United States.

The defendant waived trial by jury and entered a plea of "Not Guilty". The case proceeded to trial on March 6, 1967. The government produced three witnesses, an agent for the Federal Bureau of Investigation who merely identified the Petitioner in court as being the same person he had taken into custody after the indictment, and an employee of Elgin State Hospital whose testimony was stricken when he admitted that he did not have personal knowledge of whether the Petitioner had reported for civilian work on February 21, 1966, the date charged in the indictment.

The third witness was an employee of the State of Illinois Selective Service Headquarters in Springfield, Illinois (*not* the Clerk of Local Board 132 of Morris, Illinois), who testified that Government Exhibit B, which on its face purported to be Petitioner's Selective Service file, was a file kept and maintained in the regular and ordinary course of the business of Local Board No. 132.

Over objection from the defendant, the trial judge admitted into evidence the entire Selective Service file as Government Exhibit B-1 through B-63, inclusive. The government then rested. The only evidence of the Petitioner's alleged failure to report for civilian work consisted of a document in the above-described Board file, which on its face purported to be a letter from the Board to the hospital reading as follows: (Government Exhibit B-61):

"21 Feb. 1966

Elgin State Hospital
750 South State Street
Elgin, Illinois

Gentlemen:

Mr. Albert H. Holmes was ordered to report for civilian work at Elgin State Hospital for hospital work 21 Feb. 1966. He reported to the local board and stated he refused to accept this work and would not proceed to place of employment.

Please submit a statement to the local board to that effect.

Respectfully yours,
For The Local Board,
/s/ *Bernice Heggen*
(Mrs.) Bernice Heggen, Clerk"

Beneath the signature of the Board Clerk and in a different style of typewriter type, appears an anonymous notation:

"This office has no knowledge of the above named ever appearing at this office for an interview."

There is utterly no identification of the declarant of that statement either on the face of the document, at any other place in the Selective Service file, or in any other evidence produced at the trial. The government witness from the State Hospital was not called upon to and did not identify the document.

The document bears on its reverse a stamp reading "Received, Hospital Post Office, '66 Feb. 23, A.M. 8:39—Elgin State Hospital", and on its front side a "Received" stamp of the Local Board dated March 1, 1966.

The document was received in evidence over Petitioner's timely objection (transcript, pp. 12-15 incl., pp. 16-20 incl., pp. 23-29 incl., and particularly pp. 30-33 incl.). Said document was the basis for the District Court's finding of guilt (transcript of proceedings, p. 73).

At the close of the government's case, the defendant moved for a judgment of acquittal. The motion was denied by the trial judge. The defendant, relying upon the motion for a judgment of acquittal, rested without producing any evidence.

The Petitioner was sentenced to three years imprisonment. He appealed. The Court of Appeals for the Seventh Circuit affirmed the trial court (opinion by Duffy, J.) with one judge dissenting (Fairchild, J.).

Recognizing that the anonymous notation at the foot of Exhibit B-61 was the "keystone" to the government's case, the two-judge majority of the Court of Appeals held the document admissible as a business or official record exception to the hearsay rule under either Rule 44(c) of the Federal Rules of Civil Procedure, or §§1732(a) and 1733(a) of Title 28, U.S.C. The majority specifically found that "defendant's argument that his 6th Amendment right to confront the witnesses against him was violated, is without merit." (Appendix A. p. App. 4).

Judge Fairchild, in dissent, concluded that the document was *not* admissible as a business or official record

exception to the hearsay rule and that the majority was ". . . applying too lax a standard to the sufficiency of the government's case, and are impermissibly leaning on defendant's failure to testify." Judge Fairchild also stated:

> "The anonymous and vague notation at the foot of the letter is the keystone of the prima facie case. If that notation is inadmissible to prove failure to report, the government failed." Fairchild, J., dissenting. (Appendix A, p. App. 7.)

REASONS FOR GRANTING THE WRIT

(1) The reliance by the trial court and by the Court of Appeals for the Seventh Circuit, upon the provisions of Rule 44 of the Federal Rules of Civil Procedure for the Admission of Evidence in this case was clearly misplaced, and under Rule 19 of this Court has so far departed from the accepted and usual course of judicial proceedings, or the action of the Court of Appeals has so far sanctioned such a departure by the trial court, as to call for an exercise of this Court's power of supervision.

Rule 44 deals with the "Authentication" of copies of official documents and records. The Rule leaves intact underlying tests of admissibility of the *contents* of such documents. Thus, it provides that copies may be resorted to only when the document itself is "admissible for any purpose." Here there is no question of "authentication." The question was the admissibility of the contents of the patently hearsay notation at the foot of Exhibit B-61, to prove the truth of the matter asserted in it.

Nor does Rule 44(c) relating to the proof of the lack of an official document come into play. That rule requires that the person asserting the absence of the record be identified and attest to a diligent search for the record called for. Those conditions were not met here.

Therefore, it is evident that the admissibility of the hearsay notation must depend upon other grounds. The majority of the Court of Appeals concluded that it was admissible as a business or official record under §§1732 and 1733 of Title 28. The dissent indicated disagreement.

Is this notation such a record? The legislative history of §1732 suggests that the act was intended to cover the financial, shop book type of records, not anonymously written correspondence. See, S. Rep. No. 1965, 74th Congress, 2nd Sess., pp. 1-2. There is no proof that the notation was "made in the regular course of . . . . business." §1732(a). Indeed, there is no proof as to what business "made" it, although the Court of Appeals inferred that the hospital did.

Assuming, arguendo, that the conditions precedent to admissibility — making in the regular course of business — were met, can it be said that the other requirements of necessity and convenience, which prompted adoption of the business record exception to the hearsay rule (Wigmore on evidence, 1940 ed., §§1517-1528), are present here? Is this such a complicated, outdated transaction or event that the Clerk of Local Board No. 132 and the appropriate official of the hospital, could not be called as witnesses in open court? Is it necessary in cases of this kind to resort to the business record exception to the hearsay rule with its concomitant absence of cross examination? (Wigmore, *Supra.*)

This Court has not had an occasion to consider the Federal Business and Official Records Act since *Palmer* v. *Hoffman*, 318 U.S. 109, 111-115 (1943).[1] The court has never considered the Act within the framework of a criminal case. Yet, the decisions of the several circuits indicate that the government has consistently employed the Act in its prosecution of crimes, and is doing so in virtually all cases under the Universal Military Training and Service

[1] It is clear that the anonymous memo in the instant case does not meet the standards of admissibility spelled out in *Palmer* v. *Hoffman, Supra.*

Act. Certainly this case represents the outer-most limits of the application of the Act. Cf., *LaPorte* v. *United States*, 300 F.2d 878, 800 (C.A. 9, 1962), where the supervisor of one charity, to which defendant had been ordered to report, identified the non-report statement as a record made by the charity in the usual course of its business. Has this decision gone too far?

In the exercise of its supervisory powers this Court should issue its Writ of Certiorari in order to decide whether this case, and others akin to it represent a proper application of §§1732 and 1733.

(2) Assuming, arguendo, that the anonymous notation on Exhibit B-61 does meet the standards of admissibility under §§1732 and 1733, there emerges the serious constitutional question of whether the statute, so applied, violates Petitioner's 6th Amendment right to confront the witnesses against him? Compare, *Tot* v. *United States*, 319 U.S. 463 (1943). Certainly the notation stands as the declaration of an anonymous accuser —"Petitioner did not report."

While the legislative history of the Federal Business Records Act indicates that the Congress intended its availability in criminal cases, the types of records that Congress had in mind were of the financial, shop book variety. See, *United States* v. *Cotter*, 60 F.2d 689, and other cases cited in S. Rep. No. 1965, 74th Congress, 2nd Sess., pp. 1-2. The several Courts of Appeals have consistently so construed it without serious constitutional challenge. In addition, the judicial history of the Uniform Business Records Act (which is in all essential respects similar to §1732) suggests that the courts of those states which have adopted the Act have applied it in criminal cases, without serious challenge on constitutional grounds.

See, 9-A Uniform Laws Annotated (Business Records as Evidence) 506-530 and cases there collected.

However, the Ohio Supreme Court has recently held that application of the Business Records Evidence Act in a criminal case constitutes an impermissible violation of a defendant's right to confront his accusers. *State* v. *Tims,* 9 Ohio St. 2nd 136, 224 N.E. 2d 348 (1967), citing with approval and as controlling this Court's decision in *Pointer* v. *Texas,* 380 U.S. 400 (1965).

Does the evidence in the case at bar square with this Court's recent decisions in *Pointer* v. *Texas,* 380 U.S. 400 (1965), and *In Re Gault,* 387 U.S. 1 (1967)? In *Pointer* the court held that the use of the contents of a preliminary hearing transcript which contained the accusation of an identified accuser, violated Pointer's 6th Amendment right of confrontation. In *Gault* the court suggested (but found it unnecessary to decide) that resort to a Probation Department "referral report" would do similar violence to Gault's right of confrontation. While it does not appear from those decisions that a business record foundation approach was attempted, it seems evident that those documents could have been qualified as records "made" in the "regular course" of the "business" of the court *(Pointer)* or the Probation Department *(Gault).* Both Texas *(Pointer)* and Arizona *(Gault)* have adopted "business records as evidence" acts. 16 West's Arizona Revised Statutes Annotated 451; 11 Vernon's Texas Revised Civil Statutes Annotated, Art. 3737E (1967 pocket part, p. 161). Would a business record foundation, such as that employed in the case at bar, have worked any significant difference in the results in Pointer and Gault?[1] Petitioner

[1] While *Pointer* and *Gault* were state cases, they are relevant here because they were decided under the 6th Amendment, made applicable to the states by the 14th Amendment.

thinks not. See also, *Turner* v. *Louisiana*, 379 U.S. 456 (1965) and *Parker* v. *Gladden*, 385 U.S. 363 (1966).

If such be the case, then reliance upon the anonymous notation on Exhibit B-61 abridged his 6th Amendment right to confront the witnesses against him. *A fortiorari*, because it was the *only* evidence which tended to support the District Court's finding.

Accordingly, Petitioner respectively submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of Federal Constitutional Law.

(3) The Court of Appeals for the Seventh Circuit has decided in this case an important question of Federal Constitutional law which has not been, but should be, settled by this court, that is, is an order to report for civilian work, in the absence of a declared war or state of national emergency, void and in violation of the 13th Amendment of the Constitution of the United States?

The Petitioner was charged in the indictment with becoming a registrant at Local Board No. 132, Morris, Illinois, and being classified in Class I-O, and being ordered to report for civilian work contributing to the maintenance of the national health, safety and interest at the Elgin State Hospital, Elgin, Illinois, and knowingly failing to report for such civilian work in violation of §12, Universal Military Training and Service Act, §462, Title 50 Appendix, United States Code.

The 13th Amendment to the United States Constitution states that:

> "Neither slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Clearly, any order to report for civilian work, in the absence of a declared war or state of national emergency would be void and in violation of the 13th Amendment, as previously stated, in that it constitutes involuntary servitude, and is not being done as punishment for any crime.

By establishment of the I-O Classification, the Congress of the United States has recognized that a person who is conscientiously opposed to killing of a fellow human, or to military service, should be granted an exemption from compulsory military training. Having created the exemption for conscientious objectors, the Congress has recognized that such persons *should* have the legal right to follow the dictates of their conscience. The legislation holds the right of conscientious objection, and the resultant exemption to be of greater import than compulsory military conscription.

The obvious intent of the framers of the Constitution in view of the 13th Amendment, coupled with the 5th Amendment provision that no person shall be deprived of his life, liberty or property without due process of law, is that the liberty, privacy and integrity of the citizen would be inviolate and not subject to disturbance by the government, with the possible overriding exception of the necessity of compulsory military conscription in times when the overriding emergency and public considerations have been recognized by this Court as taking precedence. However, the Congress, having granted an exemption from compulsory military conscription to those labeled "Conscientious Objectors" has exceeded the constitutional powers granted to it by the United States Constitution, as limited by the 13th Amendment, in that the conscientious objector should then be recognized as having the same right of liberty and privacy, and to be free of involuntary servitude, as any other citizen of the United States.

This question is another ramification of the broad question which has troubled this Court for a century: The de jure obligation of a citizen to give of himself to his country, absent a de jure declaration by the Congress that the very existence of the country is threatened. See e.g. the *Prize Cases,* 2 Black 635, 17 L.ed. 459; *Ex Parte, Milligan,* 4 Wall 2, 18 L.ed. 281; *Johnson* v. *Eisentrager,* 339 U.S. 763. Last term Mr. Justice Douglas in his dissent from the denial of certiorari in *Mitchell* v. *United States,* 386 U.S. 972 brought out certain of the questions presented by the prosecution of one who refused induction into the military service. This term Mr. Justice Douglas and Mr. Justice Stewart, in their dissents from the denial of certiorari in *Mora et al.* v. *McNamara,* 388 U.S. ....., 88 S.Ct. 282, noted the questions presented by the judicial efforts of three in the military to enjoin the enforcement of an order that they participate in the military activity in Viet Nam. Many of those questions are presented here.

Of course, it can be urged that Petitioner, having been accorded Conscientious Objector status, has been relieved of the legal dilemma of *Fealty* v. *"Crime against Peace"* which was noted in *Mitchell, Supra.* But that is no answer to the question whether the Government has the power to demand another form of involuntary servitude of its citizens without first declaring that the continued existence of the Government is threatened. The latter, it is submitted, is what a declaration of war is.

The Founders of the Nation clearly recognized that government, to assure its self-preservation, requires a greater goal upon its people in time of war than otherwise. See Constitution of the United States, Art. I, §9, ¶2; Amendment III; Amendment V. And while the words "to de-

clare war" may be "outmoded phraseology"[1] in today's school of national politics, their basic meaning *vis a vis* the relation of the people to this Nation has not changed. That meaning is for this Court to decide in the same manner it has decided the myriad other Constitutional phrases which determine the relationship of the individual to the state.

Implicit within the foregoing reasons for the court assuming jurisdiction, is the contention of the Petitioner that, requiring a *conscientious objector,* who has been found entitled to an exemption from compulsory military service, to perform compulsory civilian work, results in the creation of an arbitrary and discriminatory classification by requiring civilian work to be performed by conscientious objectors ONLY. Other categories of persons who are eligible for the draft, but exempted for various reasons, have nevertheless *not* been required to perform civilian work in lieu of induction. For example, the general principals of classification are stated in Selective Service Regulations 1622.1 and 1622.2. Under the various classes are such categories as "I-S: Student deferred by statute", "I-Y: Registrant qualified for military service only in time of war or national emergency", "II-S: Registrant deferred because of activity in study", "III-A: Registrant with a child or children; and Registrant deferred by reason of extreme hardship to dependents", "IV-A: Registrant who has had completed service; sole surviving son", "IV-F: Registrant not qualified for any military service", and finally "V-A: Registrant over the age of liability for military service".

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[1] Mr. Katzenbach, testifying at Hearings on S. Res. No. 151, 90th Cong. 1st Sess., at 81 (1967).

In observing these various categories of persons exempt from compulsory military service, only in the case of the physical disability or mental disability of a person classified IV-F, is there a question raised of physical or mental inability to perform *civilian* service in lieu of induction. All of the other categories, found to be exempt or unavailable for military service, do not require the performance of civilian service in lieu of induction. Certainly the exemption of persons in those classes from military service, without a corresponding obligation for civilian service in lieu of induction, grants to persons so classified an arbitrary and superior right to that of a person classified as a "Conscientious Objector" who has likewise been found entitled to an exemption but who has then arbitrarily been required to perform civilian services in the nature of involuntary servitude. This arbitrary classification, by discriminating in the manner described, has deprived persons in the classification of "Conscientious Objector" of the equal protection of the law, and has deprived them of their life, liberty and property without due process of law in violation of the 5th Amendment of the United States Constitution.

This case presents these important Federal Constitutional questions in a clearly justiciable setting. Therefore, it is respectfully submitted that this Court should issue its Writ of Certiorari in order that it may consider and decide them.

CONCLUSION

For the reasons severally and collectively assigned here, it is respectfully prayed that this Court issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

Opinion of Circuit Court

In the
United States Court of Appeals
For the Seventh Circuit

No. 16255 SEPTEMBER TERM AND SESSION 1967

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ALBERT H. HOLMES,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 20, 1967

Before DUFFY, *Senior Circuit Judge,* FAIRCHILD and CUMMINGS, *Circuit Judges.*

DUFFY, *Senior Circuit Judge.* This is an appeal from a judgment of conviction for failing to report for civilian work at the Elgin State Hospital, Elgin, Illinois, in violation of Section 12, Universal Military Training & Service Act, 50 U.S.C. § 462.

The defense is unusual. Defendant does not question his classification as a conscientious objector. He makes no claim that he did report, for civilian work or otherwise,

at the Elgin State Hospital. He does not deny that he repeatedly advised his Selective Service Board that he would not report for civilian work.[1]

The defendant urges four major arguments. First, the evidence produced by the Government was not legally sufficient to prove that the defendant did not report for civilian duty at the Elgin State Hospital. Second, the trial court erroneously admitted hearsay evidence. Third, his rights under the Fifth, Sixth, Thirteenth and Fourteenth Amendments to the Constitution of the United States were violated. Fourth, the procedural rights guaranteed by *Matter of Gault*, 387 U.S. 1 (1967), and *Miranda* v. *Arizona*, 384 U.S. 346 (1966) were denied him.

Defendant waived a trial by jury and entered a plea of not guilty. At the trial, the entire Selective Service file of the defendant was received in evidence over the objection that the contents were hearsay.

Defendant urges that Government Exhibit B-61 should not have been received in evidence. This was an original typewritten letter from Selective Service Board 132, Morris, Illinois, addressed to Elgin State Hospital. The letter states that the defendant, Mr. Albert H. Holmes, was ordered to report on February 21, 1966, for civilian work at the hospital, and that he had stated his refusal to do so. The Local Board clerk makes a request that a statement be submitted (by the hospital) to that effect.

---

[1] On February 21, 1966, the day he was ordered to report, defendant, in a letter in his own handwriting and over his signature, addressed to his Selective Service Board mentioned his obligations as a Jehovah Witness and then stated: ". . . Therefore, I cannot accept the civilian work at Elgin State Hospital."

Appearing beneath the signature of the clerk of Local Board No. 132, in a different style of type, appear the notation "This office has no knowledge of the above-named ever appearing at this office for an interview." A stamp of the Local Board dated March 1, 1966, appears at the bottom of the face of Exhibit B-61. On the reverse side there appears the stamp "Received, Hospital Post Office, '66 Feb. 23, a.m. 8:39—Elgin State Hospital."

It is apparent that the hospital official, instead of sending a separate response to the inquiry of the Board, gave the information by the notation on the Board's original letter, that the hospital officials knew nothing of the defendant. If the defendant had reported to the hospital as ordered, the Board would have been so informed.

The notation by the hospital was, in fact, a direct reply to the inquiry addressed to the Elgin State Hospital. The hospital stamp indicates clearly the Board's inquiry was received two days after the date of the inquiry. The stamp of the Local Board shows the reply from the hospital was received by the Board on March 1, 1966. The entire exhibit was properly placed in defendant's file. The authenticity and custody of the file was established by John T. Seigle, Assistant Chief of the Field Division of the Illinois Selective Service. This was proper under Rule 44(c), Federal Rules of Civil Procedure (Rule 27 of the Federal Rules of Criminal Procedure makes Rule 44 of the Federal Rules of Civil Procedure applicable to criminal trials) and 32 C.F.R. 1606.35(a) which provides in part "Any officer or employee of the Selective Service System who produces the records of a registrant in court shall be considered the custodian of such records for the purposes of this section." *United States* v. *Ward*, 173 F.2d 628, 629 (2 Cir., 1949); *Prohoroff* v. *United States*, 259 F.2d 694, 695 (9 Cir., 1958), cert. den. 359 U.S. 907 (1959).

In *LaPorte* v. *United States,* 300 F.2d 878, 880 (9 Cir. 1962), the notation "Did not report" made by an official of a state charitable agency upon Selective Service Form 153 was held admissible under the provisions of 28 U.S.C. § 1732, as an entry made in the regular course of business of the charitable agency.

In *LaPorte,* at page 881, the Court also found the notation admissible as an official record of the Selective Service system under 28 U.S.C. § 1733 ". . . [S]ince those who observed and recorded defendant's failure to report acted as *ad hoc* officials of the Selective Service System." The Court also found an alternative ground of admissibility in the common law exception to the hearsay rule established for official statements, considering the officials of the charitable agency to be state or county officials.

We hold it was not error to have received defendant's selective service file into evidence. *Pardo* v. *United States,* 369 F.2d 922, 926 n. 7 (5 Cir., 1966); *United States* v. *Borisuk,* 206 F.2d 338, 340 (3 Cir., 1953); *United States* v. *Ward,* 173 F.2d 628, 630 (2 Cir., 1949). Furthermore, the items in that file post-dating the time of classifying defendant 1-0 (conscientious objector) would be admissible if individually considered under the Federal Official Records Act, 28 U.S.C. §1732 and § 1733.

Since we have decided that the Selective Service File and Exhibit B-61 were admissible in the trial court, defendant's argument that his Sixth Amendment right to confront the witnesses against him was violated, is without merit.

We also hold that the evidence properly before the trial court was sufficient to establish beyond a reasonable doubt that the defendant failed to report to Elgin State Hospital on February 21, 1966, as had been ordered by the Board. There is no evidence inconsistent with this conclusion.

Defendant's claim under the Thirteenth Amendment is that compulsory civilian duty in peacetime violates the prohibition against involuntary servitude contained in the Thirteenth Amendment. We reject this contention for the following reasons.

In *Badger* v. *United States,* 322 F.2d 902 (9 Cir., 1963), cert. den. 376 U.S. 914 (1964), a Jehovah Witness had been classified 1-O. He argued that compulsory civilian duty in peacetime violates the prohibition of involuntary servitude in the Thirteenth Amendment. In rejecting the defendant's argument, the Court quoted from its earlier decision in *Howze* v. *United States,* 272 F.2d 146, 148 (9 Cir., 1959)—"The appellant also urges that the Thirteenth Amendment to the Constitution prohibits a civilian labor draft in peacetime, absent a national emergency. He mis-states the case. Compulsory civilian labor does not stand alone, but it is the alternative to compulsory military service. It is not a punishment, but is instead a means for preserving discipline and morale in the armed forces. The power of Congress to raise armies and to take effective measures to preserve their efficiency, is not limited by either the Thirteenth Amendment or the absence of a military emergency."

We find ourselves in agreement with the statement of the Court of Appeals for the Ninth Circuit as hereinbefore quoted.

The defendant also contends that Congress created an arbitrary and discriminatory classification in violation of the Fifth and Fourteenth Amendments by requiring a conscientious objector to perform civilian work while other persons eligible for the Armed Service, but deferred for various reasons (Selective Service classifications 1-S, 1-Y, 2-S, 3-A, 4-A, 4-F, 5-A) have not been required to perform

civilian work in lieu of induction. The equal protection clause, as provided in the Fourteenth Amendment, or implied in the due process clause of the Fifth Amendment, *Bolling* v. *Sharp,* 347 U.S. 497, 499 (1954), requires only that all legislative classifications have a reasonable basis and that everyone placed within a classification be treated similarly. *Goesaert* v. *Cleary,* 335 U.S. 464 (1948); *Skinner* v. *Oklahoma,* 316 U.S. 535, 540-542 (1942).

The defendant also argues that, as a minor, the procedural rights guaranteed by *Matter of Gault,* 387 U.S. 1 (1967) and *Miranda* v. *Arizona,* 384 U.S. 436 (1966) were denied him. This argument is based on the fact that the clerk at the Selective Service Local Board 132, Morris, Illinois, did not warn him of his Constitutional rights before he made any incriminating statements indicating he would not report for civilian duty. This argument misses the whole point of *Gault* and *Miranda.* The *Miranda* decision was concerned with custodial interrogation. At page 444 of *Miranda,* the Court says, ". . . [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law inforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

The statements made by Holmes to the clerk at the Local Board 132 in no way come within the scope of this rule. First, Holmes was not being interrogated. He offered the incriminating statements. He was not asked to make them. Second, the clerk at the Selective Service office is not a law enforcement officer. Third, Holmes was not under arrest or denied his freedom.

Gault, supra, at page 13, is also inapplicable. It is not concerned with "procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process." It relates only "to the proceedings by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part . . ." The defendant makes no claim that any of the specific rights denied *Gault* at his trial were denied him. He merely claims that because the court admitted the evidence in question, *Gault* precludes his conviction. This argument is not worthy of further comment.

The Judge of the District Court is

AFFIRMED

FAIRCHILD, *Circuit Judge* (*disenting*). It is quite clear that defendant did not report, and that in terms of ultimate results, no injustice is done by affirming the judgment. I fear, however, that in reaching such conclusion we are applying too lax a standard to the sufficiency of the government's case, and are impermissibly leaning on the defendant's failure to testify.

Government Exhibit B-61 is described in the majority opinion. The anonymous and vague notation at the foot of the letter is the keystone of the prima facie case. If that notation is inadmissible to prove failure to report, the government failed.

It is readily inferable that the notation was placed on the letter by someone at Elgin State Hospital for the purpose of replying to the inquiry of the board. There is no clew, however, to the identity of the writer, the position he holds at the hospital, or his opportunity to be aware of the fact he negated. Such lack would not render the entry inadmissible if it qualified under 28 U.S.C. sec. 1732(a), but I cannot agree that this entry is qualified. Section 1732(a) relates to entries recording an act, transaction, occurrence, or event, if made in the regular course of business, and if it was the regular course of such business to make the record at the time of the event or within a reasonable time thereafter.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

Petition for Rehearing Denied

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

Tuesday, January 2, 1968

Before

Hon. F. RYAN DUFFY, Senior Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge

UNITED STATES OF AMERICA
Plaintiff-Appellee

No. 16255 vs.

ALBERT HUGH HOLMES
Defendant-Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

Indictment

UNITED STATES DISTRICT COURT
Northern District Of Illinois Eastern Division

UNITED STATES OF AMERICA	)
	)
v.	)
	)
ALBERT HUGH HOLMES	)

No. .....

VIO: Section 12, Universal Military Training and Service Act, Section 462, Title 50 Appendix, United States Code.

The JUNE 1966 GRAND JURY charges:

On or about February 21, 1966, at Elgin, in the Northern District of Illinois, Eastern Division,

ALBERT HUGH HOLMES,

defendant, being a male person who was required to and did register under the provisions of the Universal Military Training and Service Act, and who duly became a registrant at Local Board No. 132, Morris, Illinois, and was duly classified in Class I-O, and was ordered to report for civilian work contributing to the maintenance of the national health, safety, and interest at the Elgin State Hospital, Elgin, Illinois, then and there knowingly did neglect, fail, and refuse to report for said civilian work; in violation of Section 12, Universal Military Training and Service Act, Section 462, Title 50 Appendix, United States Code.

A TRUE BILL:

/s/ *Richard J. Marshall*

Edward V. Hanrahan
United States Attorney
LTS:bam

Judgment

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

Monday, November 20, 1967

Before

Hon. F. Ryan Duffy, Senior Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

United States of America Plaintiff-Appellee No. 16255 vs. Albert H. Holmes Defendant-Appellant	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

LIBRARY
SUPREME COURT, U. S.

No. 1072

In the Supreme Court of the United States

OCTOBER TERM, 1967

ALBERT H. HOLMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1072

ALBERT H. HOLMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1967. A timely petition for rehearing was denied on January 2, 1968. The petition for a writ of ceritorari was filed on February 1, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a letter in petitioner's Selective Service file addressed by his local board to the hospital to which he was ordered to report for civilian work, and

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a notation thereon indicating that petitioner had not reported, were properly admitted into evidence.

2. Whether the operation of the civilian work program of the Selective Service System violates the Thirteenth Amendment.

3. Whether the civilian work program of the Selective Service System denies the equal protection of the laws to conscientious objectors.

STATEMENT

After a non-jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of wilfully failing to report to his place of civilian employment as directed by his local board (50 U.S.C. App. 462). On April 18, 1967, he was sentenced to three years' imprisonment. The court of appeals affirmed, one judge dissenting.

The relevant evidence consisted of petitioner's Selective Service file, which was identified as a file kept in the ordinary course of business of petitioner's local board by John T. Seigle, Assistant Chief of the Field Division at the Illinois Selective Service Headquarters (Tr. 6, 12–15).[1] Seigle testified that the records of the local Selective Service boards in Illinois came under his control and supervision (Tr. 8, 15–16).

The Selective Service file showed that petitioner was classified I–O (conscientious objector) by his appeal board in August 1965 (B–33). Thereafter, he was

[1] "Tr." refers to the transcript of proceedings at trial, a copy of which is on file with the Clerk of this Court. "B", followed by an appropriate number, will refer to the government's exhibits at trial, consisting of portions of petitioner's Selective Service file. The exhibits are likewise lodged with the Clerk of this Court.

ordered to report to his local board on February 21, 1966, to receive instructions to report for civilian work at the Elgin State Hospital in Illinois (Tr. 22). On the designated date, petitioner personally submitted a letter to the local board stating that, because of his "ministerial obligations", he could not accept the civilian work at Elgin State Hospital (B–59).[2] On the same day, the clerk of the local board sent a letter to the Elgin State Hospital (Pet. 6) stating that petitioner had informed the board that he would refuse to accept his assigned work and would not proceed to the hospital. The letter asked the hospital to "submit a statement to that effect" (B–61). This letter was received back at the local board on March 1, 1966.[3] A typewritten notation below the signature of the clerk stated:

> This office has no knowledge of the above-named ever appearing at this office for an interview.

ARGUMENT

1. Petitioner contends that the admission of the letter, or that part thereof indicating his failure to report for civilian employment as directed, violated his Sixth Amendment right to confrontation of witnesses. However, the letter was admissible as a record made in the regular course of business of the local board and the hospital. 28 U.S.C. 1732. The letter on its face revealed that it had been sent out by petitioner's local board to the hospital requesting con-

[2] Petitioner was apparently a member of the congregation of Jehovah's Witnesses.

[3] The letter indicates on its reverse side that it was received at the hospital on February 23, 1966.

firmation of petitioner's failure to report for civilian work; that the letter was received at the hospital; and that it was returned to the local board. As the court of appeals found (Pet. App. 3), it is evident that the hospital, "instead of sending a separate response to the inquiry of the Board, gave the information by the notation on the Board's original letter, that the hospital officials knew nothing of the defendant." It is apparent that it was within the regular course of business of the draft board to send out such a letter, and within the regular course of business of the hospital to reply.[4] See *LaPorte* v. *United States*, 300 F. 2d 878 (C.A. 9); *Pardo* v. *United States*, 369 F. 2d 922, 926 fn. 7 (C.A. 5); compare *Yaich* v. *United States*, 283 F. 2d 613 (C.A. 9); *United States* v. *Borisuk*, 206 F. 2d 338 (C.A. 3); *United States* v. *Ward*, 173 F. 2d 628 (C.A. 2). We note also that the Selective Service file, of which the letter was a part, was itself properly authenticated and admitted into evidence. See 32 C.F.R. 1606.35(a); *Pardo* v. *United States, supra;* cf., *Prohoroff* v. *United States*, 259 F. 2d 694 (C.A. 9), certiorari denied, 359 U.S. 907.

[4] Nothing in *Palmer* v. *Hoffman*, 318 U.S. 109, is to the contrary. That case held only that a written statement by a railroad employee to an official of the company investigating an accident in which the employee was involved, was not a record made in the company's ordinary course of business as a public carrier.

Nor is *Pointer* v. *Texas*, 380 U.S. 400, in point. In *Pointer*, the transcript of a preliminary hearing was deemed inadmissible because the defendant, who was without counsel at the time of the preliminary hearing, was unable then effectively to cross-examine the witnesses against him. Here there is no problem of lack of counsel with relation to the admissibility of evidence; the question in this case turns on the nature of the evidence itself.

2. There is no merit in petitioner's argument (Pet. 13) that the civilian work program of the Selective Service Sysem is unconstitutional in peacetime as a form of "involuntary servitude". The program (authorized under 50 U.S.C. App. 456(j)) is valid, under the "necessary and proper" clause of the Constitution, as incident to the power of Congress, under Article I, Section 8, to "raise and support armies." It is an alternative to compulsory military service and serves to preserve discipline and morale in the armed forces. *Badger* v. *United States,* 322 F. 2d 902 (C.A. 9), certiorari denied, 376 U.S. 914; *Howze* v. *United States,* 272 F. 2d 146 (C.A. 9). Even assuming that the present time is one of "peace", it has long been settled that the power to raise armies by conscription is not limited to periods of war or national emergency. *E.g., United States* v. *Henderson,* 180 F. 2d 711 (C.A. 7), certiorari denied, 339 U.S. 963; *Etcheverry* v. *United States,* 320 F. 2d 873 (C.A. 9), certiorari denied, 375 U.S. 930.

3. Petitioner's contention that the civilian work program denies to conscientious objectors the equal protection of the laws because those in other exempted or deferred categories do not have to serve is also unfounded. The system of classification is not irrational. The fact that those in all deferred or exempted categories, other than those with a physical disability, are *able* to perform civilian work clearly does not negate the existence of rational considerations for differentiating among those categories with regard to a requirement of civilian work in lieu of induction. Compare *Goesaert* v. *Cleary,* 335 U.S. 464; *McLaughlin* v. *Florida,* 379 U.S. 184, 190–191; *Loving* v. *Virginia*

388 U.S. 1, 8–9. For example, it would be unreasonable to require students or registrants deferred by reason of hardship to dependents to serve, since to do so would defeat the policy underlying their deferment. By contrast, there is no reason why a person "conscientiously opposed to participation in war in any form" cannot reasonably be made to perform work "contributing to the national health, safety, or interest" (50 U.S.C. App. 456(j)) as an alternative to his obligation to bear arms in support of his country. See *United States* v. *Macintosh*, 283 U.S. 605, 623.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
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Assistant Attorney General.
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MARCH 1968.

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